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No. 388

In the Supreme Court
of the United States

HERBERT C. BARKER and
ELIZABETH S. BARKER,
husband and wife,

Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellee.

On Appeal from the Supreme Court of the State of Oregon

JURISDICTIONAL STATEMENT

HERBERT C. BARKER and
ELIZABETH S. BARKER,
5278 S. E. Hillwood Ave., Milwaukie 22, Oregon,
Defendants-Appellants in Propria Persona.

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Oregon entered on January 22, 1963, affirming the Decree of Foreclosure and Deficiency Judgment, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Oregon is reported in 75 Oregon Advance Sheets 797, and is attached hereto as Appendix A. There was no opinion given by the Circuit Court of Clackamas County, State of Oregon.

JURISDICTION

This is a suit in equity to foreclose on real property which also sought a deficiency judgment. The Judgment of the Supreme Court of Oregon was entered on January 22, 1963, and a timely Notice of Appeal was filed in that Court on April 1st, 1963. The Jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Rogers* v. *Alabama*, 192 U.S. 226.

QUESTIONS PRESENTED

1. Whether, it is a matter of ethics or of law, and whether the Court's ruling that it lacked authority to prevent and restrain an attorney from representing an adverse interest to a former client on the very same matter the attorney was originally retained to defend, denied appellants equal protection and due process of law.

2. Whether the use by opposing side of appellants' own attorney who had received the trust and confidence of the appellants on this very same matter, so far deprived him of a fair trial as to have denied him due process.

3. Whether the instructions by the Court to the appellants not to present any evidence of the prior relationship with the plaintiff's attorney and the subsequent refuting of their defense for lack of supporting evidence so far denied them a fair trial as to have denied them due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitutional provisions basically involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This is a suit in equity to foreclose on real property and which also sought a deficiency judgment.

On or about April, 1955, Mr. William Saari purchased the real property at issue by borrowing approxi-

mately $14,900 from Dean Vincent Inc, of Portland, Oregon, secured by a mortgage on said property and on October, 1955, appellee hereafter referred to as Metropolitan Life Insurance Co., purchased the contract from Dean Vincent Inc. On or about April 1959, appellant attempted to purchase said property from the Saaris. An earnest money offer (Exhibit No. 6) was signed only by Mr. Herbert C. Barker, appellant, which was the only document ever signed by the appellants. After the transaction was apparently closed a dispute arose and the Saari's agent, (Kronberg Brothers Real Estate) refused to deliver the deed and title to the appellants (Tl. Tr. 45-46). Whereupon appellants went to their attorneys, Mautz, Souther, Spaulding, Kinsey & Williamson, who advised the appellants that they (Mautz, etc.) would handle the matter and advised appellant to start making payments to Dean Vincent, which appellants had refused to do without delivery of the deed. The law firm of Mautz, etc. kept the appellants' file in this transaction in their office (Tl. Tr. 76-80) and sent a bill to the appellants for the service done in regard to the matter of the deed, which appellants paid. (Reply to Answer to Petition for Instructions). After one year and still without delivery of the deed and title appellants stopped making payments after discussing the matter with their attorneys Mautz, etc. A month later a dispute arose between appellants and their attorneys Mautz etc. concerning their irregular handling of another case of the appellants. The lawfirm of Mautz etc. returned most of the file of the appellants including the file on the real property. A month

later appellants discovered that the same law firm of Mautz etc. had been retained by Metropolitan Life Insurance Co., to handle foreclosure on the real property. When appellants protested to Mr. Souther about this, (Tl. Tr. 3-4) appellants were assured that the law firm of Mautz etc. would not handle the foreclosure, however instead the law firm of Mautz etc. filed a motion resigning from representing the appellants in another case and changed the date (R. Complaint, Tl. Tr. 4) of the verification and filed the complaint against the appellants. Appellants after some difficulty were able to get Mr. Hawkins, a lawyer, who agreed to represent them. When Metropolitan refused appellants' offer to quit claim the property (R. Respondents Brief 3) but insisted on seeking a deficiency judgment. Mr. Hawkins refused to make an appearance for the appellants which appellants had to do themselves (R. Answer) without the aid or advice of counsel in order to prevent a default. Mr. Hawkins refused (Tl. Tr. 33-34) to return the file to the appellants without their signing a letter (Exhibit D) which the appellants thought would be damaging to them. Appellants refused to sign this letter and were only able to get their file back just five days before trial was set. Appellants were not represented or advised by counsel at any time in this case since their second attorney Mr. Hawkins refused to put in an appearance for them (Tl. Tr. 33-34). Appellants went to trial and have appealed their case through the Oregon Supreme Court and finally to the Supreme Court of the United States without any advice or benefit of counsel, despit their consistent, continuous efforts to obtain

counsel. Appellants have complained (Tl. Tr. 3) and contend that they have not been able to get an attorney to defend them because of the fact that the senior member of the firm of Mautz, Souther etc. is on the Board of Governors and is also very influential in politics in Oregon (R. Appellants Abstract of Record and Brief 15). Appellant has only gone through the first year of high school. Appellant's wife was born and raised in Holland and has only been in the United States for eight years.

HOW THE FEDERAL QUESTIONS ARE PRESENTED

Before the trial started (Tl. Tr. 3-4) appellants objected to plaintiff using appellants' own attorney against them in the very same matter they had been retained to represent. The Trial Judge ruled that it was a matter of ethics (Tl. Tr. 7-8) rather than law and that the Court had no authority to act. When Metropolitan had rested their case (Tl. Tr. 63) appellants again objected to the use of their own attorney against them and were reminded by the Court of its previous ruling (Tl. Tr. 63).

When appellants were about to present their defense, appellants were instructed (Tl. Tr. 70) by the Court not to present any evidence of the prior relaship between appellants and plaintiff's attorneys.

On June 21, 1961, appellants filed a motion (R. Motion for New Trial) giving the above as some of the reasons.

On July 3, 1961, an order was entered denying the

motion. In appellants Brief to the Supreme Court of Oregon these errors were again raised (R. Appellants' Abstract of Record and Brief, Error No. 3). The Supreme Court of Oregon in their decision of December 31, 1962, ruled that appellants rights to a fair trial were not violated.

THE QUESTIONS ARE SUBSTANTIAL

This case revolves around one basic question—the propriety of attorneys representing an adverse interest to a former client on a matter related to what they were originally retained to defend, and the Court's authority to prevent such happenings.

1. The Trial Court ruled three different times that it lacked such authority. The first time (Tl. Tr. 7-8).

> "THE COURT: May I ask you this question? Do you and the members of your firm feel there was no conflict of interest at the time of the filing of this suit?
>
> MR. THOMPSON: We are satisfied and Mr. Mautz and Mr. Souther are very familiar with the situation.
>
> THE COURT: Mr. Moore was not representing Mr. Barker according to you, at the time that this suit was filed?
>
> MR. THOMPSON: That is my honest contention.
>
> THE COURT: This is a matter of ethics rather than a matter of law.
>
> MR. THOMPSON: That is right, and a complaint has been filed with the Bar Association by Mr. Barker and the Bar Association has refused to take any action.
>
> THE COURT: Mr. Barker?

MR. BARKER: Your Honor, I —

THE COURT: I don't believe this is a matter of law that the Court can decide in this particular case. The only thing this Court can do is rely on the officers of the Court as attorneys who appear before it as to whether or not there is a conflict of interest exists. If you contend that there is, and you have filed a complaint with the State Bar Association, regarding this matter, then that is the proper place for the question to be settled."

The second time (Tl. Tr. 63) the Court said:

"Now, as far as the issue regarding the relationship of this firm with you, I have previously stated that I don't think that I can in this case, make any ruling affecting the outcome of this case based upon the contention that they were representing you at the same time they were representing the plaintiff."

And finally when the Court was instructing the appellants when it was time to present their defense (Tl. Tr. 70) the Court:

"Now, you have an opportunity at this time to present any evidence to the Court that you desire. Are there any other witnesses beside yourself that you desire to call? I am not concerned with any evidence here regarding the fact that this firm may have represented you at the time it was called, I don't think this is for the Court to decide. I will concede if you will call witnesses you might be able to prove it. I don't know. I can see if you did prove it to the Court at this time would be powerless in this suit to take that into consideration."

Appellants contend that the Court's possess the authority and is supported by *Porter* v. *Huber*, 68 F. Supp. 132, quoting with approval from Am. Jur. Attorney-

Client p. 296 "that it is not only the right but the duty of the Court to restrict and restrain an attorney" and also in *Wilson* v. *State*, 16 Ind. 392, in granting a new trial the Court held that to "Sanction such a course would be to defeat the very purpose of the Court viz to dispense justice" and also in *State* v. *Halstead*, 73 Iowa 376 in granting a new trial held "He learns from his client the weak points of the case as well as the strong ones. Such knowledge carried by the recalcitrant attorney to the other side would be the sure means of defeat and injustice to the client. If attorneys are authorized after employment, to take retainers from the other side, the exercise of this authority would be the means of oppression through which clients could be coerced into payments of extortionate fees; and the profession of the law would be brought into disgrace by permitting those who pursue it to take advantage of the secrets of litigants obtained while the confidential relation of attorney and client existed."

The firm of Mautz, Souther, etc. has denied ever representing the appellants in this matter but the testimony of Mr. Moore of the firm of Mautz etc. is revealing (Tl. Tr. 76-80). Appellants petitioned the Supreme Court of Oregon for permission to introduce a bill from the firm of Mautz etc. requesting payment for their services in regard to the nondelivery of the deed to the property and a canceled check showing payment was made (R. Petition for Instructions and Ruling, Reply to Answer and Affidavit) but instead an order was entered on June 12, 1962, striking the petitions from the record.

It is submitted that the Decisions of the Oregon Courts to sanction the use of appellants' own attorneys against them fail d to recognize the basic rights of all American citizens to be granted a fair trial and that if this practice is allowed to continue that only chaos would be the result and this would be against public policy.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

HERBERT C. BARKER and
ELIZABETH S. BARKER,
5278 S. E. Hillwood Ave.,
Milwaukie 22, Oregon,
Defendants-Appellants in
Propria Persona

APPENDIX

PER CURIAM.

Defendants appeal from a decree which foreclosed plaintiff's mortgage on defendants' real property. The decree also awarded a deficiency judgment. Defendant Herbert C. Barker appeared at the trial of the case and defendant himself without the aid of counsel. A default decree and judgment was entered against Elizabeth S. Barker. Both Mr. and Mrs. Barker appeal.

There is no question of defendants' failure to perform the terms of the mortgage and of plaintiff's right to foreclose. The only issue is plaintiff's right to a deficiency judgment. At the trial and on appeal, defendants rely on allegations of misconduct on the part of plaintiff's attorneys for their defense to the plaintiff's demands. However, the charges of collusion and fraud are not limited to plaintiff's attorneys. Defendants have attempted to explain away every document involved in the transaction by accusations of fraud on the part of the other persons engaged in the transaction. The evidence does not support the charges in the least degree. Thre is nothing in this record which would avoid plaintiff's right to the relief it prayed for.

The trial judge was cautious to protect defendants' rights in every way. The trial was fair. Defendants' claim of error are without merit. The decree is affirmed.

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MOTION TO AFFIRM OR DISMISS

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MISCELLANEOUS:

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Annotation, Propriety and Effect of Attorney Representing Interest Adverse to That of Former Client, 51 ALR 1307 5

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the decree of the Supreme Court of the State of Oregon be affirmed, or in the alternative that the appeal from such decree be dismissed on one or both of the following grounds:

1. The appeal does not present a substantial federal question.

2. The substantial federal question, if present, was not properly raised in the State Court proceedings.

STATEMENT

This is an appeal by appellants from a decree of the Oregon Supreme Court affirming a Decree of the Circuit Court of the State of Oregon for Clackamas County, foreclosing a mortgage on certain property owned by appellants, which decree included the award of a deficiency judgment against appellants in the event that the proceeds of the foreclosure sale were less than the amount awarded to appellants in the decree.

The note and mortgage involved were executed on April 11, 1955, by William Saari and Elizabeth Saari. On March 21, 1959, appellants signed an earnest money receipt agreeing to purchase the mortgaged property from William Saari and Elizabeth Saari and to assume the existing mortgage thereon. This purchase by appellants was closed by Kronberg Bros. Realty, the realtor involved. On April 8, 1959, a deed to the property was recorded in Clackamas County, Oregon, running from William Saari, et ux, to appellants. The deed was recorded at the request of Kronberg Bros. Realty and returned to them after recording. However, subsequent to this recording Kronberg Bros. Realty declined to deliver the deed to appellant Herbert C. Barker, because of their claim that Mr. Barker owed them $47.64 in closing costs.

During the early part of 1959 James R. Moore of the law firm of Mautz, Souther, Spaulding, Kinsey & Williamson (hereinafter referred to as the "Mautz firm") became the attorney for Herbert C. Barker in connection with a dispute with one Walter Martin.

In July, 1960, the Mautz firm received instructions from appellee to foreclose the subject mortgage. Shortly thereafter the representative of the Mautz firm in charge of such foreclosure (not James R. Moore) ascertained that Barker was, or had been, represented by the Mautz firm. Consequently, filing of the foreclosure complaint was withheld until the Mautz firm was satisfied that complete termination of their relationship with Herbert C. Barker had been accomplished and that no conflict of interest would exist as a result of the Mautz firm representing appellee. The complaint was filed September 14, 1960. On October 18, 1960, appellants' new attorney, Robert G. Hawkins, made an offer on behalf of appellants to reinstate the subject mortgage. On October 21, 1960, the deed in favor of appellants which had been recorded April 8, 1960, was receipted for by Herbert C. Barker through his attorney, Robert G. Hawkins. A reinstatement agreement concerning the subject mortgage between appellants and appellee was signed on or about November 2, 1960. However, as appellants did not perform the terms of the reinstatement agreement, the foreclosure suit was again pursued, resulting in a trial before the Circuit Court of the State of Oregon for Clackamas County on April 7, 1961, and the decree in question.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Although appellants' jurisdictional statement sets forth three questions as being presented, careful analysis reveals that appellants are relying on only one point, namely: That the representation of appellee by counsel alleged to have formerly represented appellants in the same matter, constitutes a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Appellee and its attorneys have vigorously denied, both in the trial court and in the Oregon Supreme Court and do so now in the Supreme Court of the United States, the existence of a conflict of interest resulting from the alleged representation by the Mautz firm of appellants in the same matter. Appellee's contentions in this regard have been affirmed, in effect, by the trial court and the Oregon Supreme Court. Be that as it may, even assuming for the benefit of argument that the Mautz firm had represented appellants in the same matter prior to the filing of the foreclosure suit, and that the Mautz firm represented appellee in the foreclosure suit, such does not constitute a violation of due process clause of the Fourteenth Amendment to the Federal Constitution.

There is a rather substantial body of law concerning the propriety and effect of an attorney representing an interest adverse to that of a former client, many of which cases are cited in an annotation on that subject

in 52 A.L.R.2d 1243. Appellee makes no argument with the firmly established general rule that an attorney who has acted for one client in a matter cannot thereafter undertake representation of a client in the same matter, whose interests are adverse to those of a former client. This rule is most often said to be grounded upon the confidential relationship which exists between attorney and client, the courts taking the view that by imposing this disability upon the attorney, confidential information conveyed by the former client is protected from disclosure and wrongful use. However, in reviewing the large number of cases cited in the 52 A.L.R.2d annotation and also those cited in a prior annotation on the same point in 51 A.L.R. 1307 appellee has found no case in which any court has held or even discussed the possibility that the existence of an adverse interest in violation of the rule constitutes a violation of due process of law. Admittedly, in many cases the judgment has been reversed by the appellate court based upon the existence of an adverse interest in counsel and in other cases disciplinary measures or injunctive action have been taken against the attorneys involved. But this action has been taken not because of a violation of due process. In *State of Kansas* v. *Leigh*, 178 Kan. 549, 289 P.2d 774 (1954) the Court held that it is an inviolate rule long established in the canons of ethics of the legal profession and by judicial opinion thtat an attorney cannot represent conflicting interests and that this rule is designed to protect confidential information from being used against a former client. The judicial decisions clearly indicate the basis for the rule as being the desire

to protect the former client from the use against him in a subsequent matter of information which he may have given to the attorney in confidence as a result of the prior relationship.

Appellee contends that the use of such confidential information by an attorney in a subsequent piece of litigation, however unethical or morally wrong, is not a violation of due process, for the use of such information merely results in additional facts being presented to court to assist it in arriving at the proper result. It cannot be said that due process is violated by the placing before the court of all available information concerning the litigation being tried. Of course, the information placed before the court might be inadmissible because of being obtained in a manner repugnant to another prohibition of Federal or State law, as, for example, information obtained through an unlawful search and seizure, but in the case at bar no allegation is made that the alleged utilization of confidential information by appellee's counsel is anything but a violation of due process.

Actually, of course, as presented to the trial court and the Oregon Supreme Court, the record reveals no information of any kind utilized by appellee which was of necessity obtained through the fact that the Mautz firm formerly represented appellants. Appellee's case was a simple matter of proving a mortgage default and appellants' assumption thereof. The existence of the default under the note and mortgage has never been questioned and was easily provable with facts in no way based upon any information which might have been

given by appellants to the Mautz firm. Evidence concerning the delivery of the deed upon which the deficiency judgment was based was derived from obvious witnesses (the realtor and Robert G. Hawkins) readily available to all parties. The identification of and testimony by these witnesses was in no way dependent upon nor derived through confidential information, if any, obtained by the Mautz firm from appellants. The trial transcript proves this beyond question.

THE SUBSTANTIAL FEDERAL QUESTION, IF ANY, WAS NOT PROPERLY RAISED IN THE COURTS BELOW

Rule 15 (1)(d) of this Court states that a petitioner seeking review of a state court decision must "specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised * * *".

In appellants' jurisdictional statement they set forth that the federal questions were presented by various objections before the trial court and the Oregon Supreme Court to the effect that it was improper for appellee to use appellants' own attorney against them.

As the briefs and all arguments before state courts are not ordinarily part of the record filed with the Supreme Court, they cannot be used to establish that a federal question was raised. *Lynch* v. *New York, ex rel Pierson*, 293 U.S. 52, 55 S. Ct. 16 (1934). Consequently, appellants' claim that the federal questions were raised

in their brief to the Oregon Supreme Court has no effect upon the jurisdiction for this appeal.

A review of the trial court transcript cited by appellants, of the Motion for New Trial cited by appellants and of appellants' brief to the Oregon Supreme Court, as well as the decision of the Oregon Supreme Court, fails to reveal any specific allegation whatsoever that the Fourteenth Amendment to the Constitution of the United States was violated in any manner by the proceedings in question. In *Bowe* v. *Scott*, 233 U.S. 658, 34 S. Ct. 769 (1914) it was held that an averment that property was taken "without due process of law", making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referrable to the State Constitution and affords no basis whatever for invoking the jurisdiction of the United States Supreme Court. Article I, Section 10 of the Constitution of the State of Oregon provides for due process of law, as follows:

> "SECTION 10. *Administration of Justice*: No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him and his person, property or reputation."

Consequently, any reference by appellants to "due process" or "fair trial" must be deemed to have reference to the above quoted due process clause of the Oregon Constitution and the due process rights afforded appellants under Oregon law.

In *F. G. Oxley Stave Co.* v. *Missouri*, 17 S. Ct. 709,

(1897) the court held that the Supreme Court of the United States cannot review a final judgment of a state court, even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appears from the record that such title, right, privilege or immunity was "specially set up or claimed" in the state court as belonging to such party under the Constitution or some treaty, statute, commission or authority of the United States.

Appellee is aware of the leniency granted to litigants without counsel in applying the requirement that the federal question be raised in the state court. However, it is submitted that anyone granting leeway to appellants due to their lay status must remain aware of the fact that the trial in the trial court was conducted by appellant, Herbert C. Barker, and of his preparation in the trial court of an answer, a motion for postponement of trial date, a motion for new trial on seven different grounds, of his preparation of all necessary papers regarding the appeal from the trial court to the Oregon Supreme Court, including notice of appeal, numerous motions for extension of time and orders approving same, answering paper in opposition to motion for dismissal of appeal, petition for instructions and ruling, appellants' abstract of record and brief (25 pages in length) and appellants' reply brief (6 pages in length), to say nothing of the jurisdictional statement filed in this Court. Consequently, it is inconceivable that in this case appellate jurisdiction was properly conferred by the Fourteenth Amendment being first specifically referred to in the jurisdictional statement filed herein.

It is recognized that failure to raise the federal question below may be made moot by consideration of the federal question by the Oregon Supreme Court. However, to do so the opinion must explicitly or impliedly recognize the presence of a federal question and render a decision thereon. Stern and Gressman, Supreme Court Practice, Third Edition (1962). Examination of the opinion reveals that the Oregon Supreme Court merely indicated that the trial judge was cautious to protect appellants' rights in every way and that the trial was fair. This language does not constitute recognition of a federal issue. Under the *Bowe* decision cited above, reference that the trial was fair must be deemed to have been a decision that the trial was fair under the Oregon Constitution and the laws of the State of Oregon.

CONCLUSION

Appellants have clearly failed to show that a substantial federal question is involved and have also clearly failed to show that even if a substantial federal question is involved, that the question was properly raised in the lower court proceedings. Appellants have received fair and impartial administration of justice from the courts of the State of Oregon. There is no jurisdiction for appeal of this mortgage foreclosure decree to the Supreme Court of the United States. Appellee requests affirmance of the decree and opinion of the Oregon Supreme Court, or dismissal of the appeal, whichever the Court deems applicable.

Respectfully submitted,

KENNETH E. ROBERTS,
Attorney for Appellee,
Metropolitan Life Insurance
Company.